

Feb. 25, 1957

Memorandum No. 11

Subject: Study No. 36 - Condemnation Law
and Procedure.

This study, added to the Commission's agenda on the motion of Senator Cobey, is one to determine "whether the law and procedure relating to condemnation should be revised in order to safeguard the property rights of private citizens".

We have been engaged for some time in negotiations with Mr. Stanley S. Burrill of the Los Angeles bar, with a view to engaging him as research consultant to the Commission on this matter. Mr. Burrill has met with the Southern Committee once. The matter was last discussed by the Commission at its October meeting. Two conclusions were then reached: (1) That the study should be done in two parts, thus spreading its cost over two fiscal years (this decision was dictated in part by lack of sufficient research funds this year to underwrite a single contract for the entire study); (2) that Mr. Burrill be requested to prepare an outline of the matters which Study No. 36 might cover and to suggest a division of the subject matter for purposes of studying it under two contracts.

Mr. Burrill has prepared the outline requested. A copy of it, together with his covering letter, is attached. Three questions for decision at the March meeting are thus presented:

1. Shall we now enter into a contract engaging Mr. Burrill as research consultant to the Commission for the first part of the condemnation study?
2. If so, shall his study cover the topics which he has recommended be studied at this time or should we ask him to study some other combination of the matters listed in his outline?

3. How much shall we pay Mr. Burrill for the study which we ask him to make [a maximum of \$1,500 is available this year]?

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

COPY

Law Offices

COPY

HILL, FARRER & BURRILL
411 West Fifth Street
Los Angeles 13, Calif.

February 18, 1957

Mr. John R. McDonough, Jr.
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California

Dear Mr. McDonough:

I am enclosing original and one copy of "Outline of Possible Areas of Inquiry by the California Law Revision Commission -- Condemnation Law and Procedure". I trust that this outline is what your Commission has in mind. If it fails to meet your needs in any way, please let me know.

As noted at the conclusion of the outline, I feel that the questions of moving expense, possession and passage of title, and rules of evidence are matters of primary concern. We can undertake the preparation of a study of these fields and the preparation of recommended changes in the law, for completion by June 1, 1957.

Other portions of the study could be undertaken by us in future years, if so desired by the Commission.

Would you kindly let us know your wishes on the matter?

Incidentally, we are informed that Assembly Bill No. 457 relating to the value of a lessee's interest (See my Outline, section VI C 1) has been introduced and referred to the Committee on Revenue and Taxation. It would seem advisable to coordinate such legislation into any proposed general revision, if possible to do so.

Sincerely,

/s/ Stanley S. Burrill
e.r.

STANLEY S. BURRILL
OF
HILL, FARRER & BURRILL

SSB:elr
Encls.

OUTLINE OF POSSIBLE AREAS OF INQUIRY BY THE
CALIFORNIA LAW REVISION COMMISSION

Condemnation Law and Procedure

PREPARED BY

STANLEY S. BURRILL
OF
HILL, FARRER & BURRILL
411 West Fifth Street
Los Angeles 13, California

February 16, 1957

OUTLINE OF POSSIBLE AREAS OF INQUIRY BY THE
CALIFORNIA LAW REVISION COMMISSION

Condemnation Law and Procedure

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OUTLINE OF POSSIBLE AREAS OF INQUIRY BY THE
CALIFORNIA LAW REVISION COMMISSION

Condemnation Law and Procedure

I. INTRODUCTION

The California Law Revision Commission is undertaking to study "whether the law and procedure relating to condemnation should be revised in order to safeguard the property rights of private citizens". The Secretary of the Commission has requested Stanley S. Burrill of Hill, Farrer & Burrill, Los Angeles, California and his staff to prepare a full outline of a proposed study and report of condemnation law and procedure. Accordingly, the following report is submitted for the purpose of describing those areas of condemnation law and procedure which may, in the opinion of the authors of this study, warrant Legislative consideration.

No effort has been made in this outline to suggest what the law should be. Rather the purpose has been only to set forth the existence of problems or potential problems. In some cases alternative methods and procedures for the meeting of specific problems have been discussed.

II. ELEMENTS OF COMPENSATION

A. Introduction.

The Constitutions of the United States and the State of California as well as a great body of other statutory and case law insure "just compensation" to the owner whose property is taken or

damaged for public use. In California "just compensation" has been defined as the "fair market value" of the property actually taken and, if the property sought to be condemned is only part of a larger parcel, such damages as may accrue to the portion of the property not sought to be condemned by reason of the severance of the part taken and the construction of the improvement in the manner proposed by the plaintiff. If the property remaining in the owner's hands is specially benefited by the construction of the improvement, the amount of special benefits may be offset against severance damage. (C.C.P. 1246)

Does the foregoing definition result in payment of "just compensation" to the owner whose property is condemned?

B. Cost of Removal and Relocation.

1. Introduction.

In almost every condemnation case the owner has some expense incident to moving from his former location to a new one, or relocating on his remaining property. To the average home owner these expenses usually constitute a substantial financial burden, and for large business establishments the expenses of moving can run into hundreds of thousands of dollars. Under present California law, the owner is not compensated for the expense of moving his personal property.

A related problem arises where a business has valuable machinery or fixtures attached to the realty. In many cases the owner would be willing to take all or a part of such machinery and equipment to his new location if he could be compensated for the cost of moving.

Rarely does the condemnor desire to acquire such property. Since under present California law no provision is made for the cost of relocating such items, the financial necessities of the owner usually require that he leave them and the condemning body is required to pay for them as part of the realty.

Is a revision of the law to provide for moving expense needed?

2. Scope of Inquiry.

A study of this problem should give consideration to the following matters, among others:

(a) Standard for Fixing Compensation. How should reimbursement for moving expenses be determined and what limits should be placed upon them? For example, should the amount be a fixed sum, or a fixed percentage of the value of the property taken from the owner, or the actual amount paid for moving with or without other limitations, or some other amount?

(b) Property Included. What property should be embraced within the statute -- personal property, trade fixtures, other fixtures?

(c) To Whom Allowable. What class of persons should the statute benefit -- owners, tenants, or both? The owners of residential property, commercial property, industrial property, or all?

(d) At Whose Election. Should there be an election to pay or receive moving expenses? Should it be the plaintiff's or the owner's? If the owner's, should it be the landlord's or the tenant's

in a landlord-tenant situation? When must any election be made, and in what manner?

(e) Total or Partial Taking. Should the rule apply in the case of a partial taking as well as in the case of a total taking of an owner's property? In a partial taking, is an owner to be limited to a move to his remaining property?

(f) Permanent or Temporary Taking. Should the statute apply to cases of both permanent and temporary takings? (Under certain circumstances, present law allows moving expenses in a temporary taking situation.)

(g) Procedure for Assessment and Payment. Should the award for moving expenses be made in the main litigation, or a separate supplementary proceedings, or handled by an administrative arm of the Government? Should any award be included in a single sum as just compensation, or segregated?

C. Compensation for Loss of Profits and Business Interruption.

1. Introduction.

The law is well settled that when an owner's real property is taken by eminent domain, in whole or in part, any damages he may suffer by way of loss of profits or business interruption are non-compensable. In theory, since the condemnor is acquiring only the owner's real property -- his land and improvements -- that is all it is required to pay for. The business conducted upon the premises is not affected, in contemplation of law. However, an owner may in fact suffer substantial damage by virtue of impairment of profits or business interruption arising from the taking.

For example, an owner who has a portion of his business establishment condemned may be unable to operate as efficiently as he could before. While a portion of the damage may be reflected in a depreciation of the value of the realty, and hence is compensable, another portion of his damage, lost profits, is now a non-compensable item under the law. Should loss of business profits and damage arising through business interruption be treated as elements of "just compensation"?

2. Scope of Inquiry.

A study of the problem should consider the following items, among others:

(a) Standard for Fixing Compensation. One of the most difficult problems in this area is the ascertainment of a standard for fixing compensation. The inquiry must necessarily extend to sales, costs, managerial abilities, prospects and many factors not now present in condemnation valuation procedures. However, mere difficulty of assessment should not alone prevent payment of such damages, if they do in fact constitute an element of just compensation; and such damages can be and have been ascertained as, for example, in payments made under business interruption insurance.

Should the owner's loss of profits be measured by what he would have received had the condemnation not taken place compared with what he receives following the condemnation? Is the first element to be determined by reference to the owner's actual profits or by reference to a theoretical norm? If the former, what period should be adopted for fixing the owner's actual profits? Similarly, should the determination of profits following condemnation

be fixed with reference to the owner's actual operation or a theoretical norm or average operation?

Should loss of profits be limited to a fixed period, or measured in perpetuity, or otherwise limited to extent?

(b) Under What Circumstances Allowable. Should the allowance for loss of profits be made in every situation or only in cases where the owner continues in business on the remaining property? (Where only a part of a property is taken, or the taking is temporary, the owner may continue in business at the same location, permitting his actual profits as affected by the condemnation to be determined. In the case of an entire taking the owner may cease business entirely, or may relocate at a place some distance removed, or at a time remote from the time of taking, making the actual profit experience of the owner relatively more difficult to assess.)

Should a distinction be made between situations in which the taking might have little effect on the business operation (as, for example, where the owner could relocate next door) and situations where the taking necessarily results in substantial impairment of the business operation (as, for example, where the owner of a private beach resort loses the only available stretch of beach land in the area)?

Should compensation for loss of profits be paid in case of a permanent taking of property, a temporary taking of property, or both?

Should compensation be paid for temporary loss of business (business interruption) as well as a permanent loss resulting from a taking.

(c) To Whom Allowable. Should a loss of profits award be made to tenants as well as owners? Should it be made applicable in the case of residential income properties as well as commercial and industrial properties?

(d) Manner of Raising Issue. Should loss of profits and the amount thereof be pleaded specially or as a part of a general allegation of damage?

(e) Procedure for Assessment and Payment. Should an award for loss of profits be included with the main award as part of the just compensation or assessed separately?

D. Compensation for Delay in Payment.

1. Introduction.

The matter of compensating an owner for delay in payment usually arises in cases where possession of the property is taken prior to the payment of the award. Such situations are considered subsequently in this outline under the heading, "III B 6 - Compensation for Loss of Possession".

However, the owner who does not have possession of his property taken from him nevertheless suffers certain burdens upon the mere filing of a complaint in condemnation and recording of the lis pendens. As a practical matter it becomes difficult if not impossible to sell or dispose of the property, and to borrow money using the property as security. If he has rented the property, in many cases the tenants will move and he will have difficulty in replacing them. Also, as a matter of statute law, he cannot recover for improvements placed upon the property after service of summons upon him (C.C.P. 1249), and he therefore can do little to either develop his land or, perhaps, even substantially repair it.

In view of these factors should any study into the elements of just compensation include an inquiry into what damage an owner may suffer by the mere determination that his property is to be acquired for public use, or by the filing of a suit to condemn?

2. Scope of Inquiry.

Such a study should consider the following matters, among others:

(a) Accrual of Damage. From what date is there such an interference with the owner's interest as to result in a compensable loss -- from the date of first threat of condemnation, the date of official adoption of a resolution to condemn by the acquiring body, the date of the filing of the complaint, or some other time?

(b) Standard for Fixing Compensation. What is to be the standard of compensation -- interest, damages fixed by appraisal, or some other standard?

(c) Effect of Appeal. After a judgment of condemnation has been entered and one party or the other appeals, a substantial period of time may elapse before a final determination of the litigation. Present law permits a condemnor to take possession of the property by payment of the judgment into court, and the owner may under certain circumstances withdraw the deposit. However, the condemnor may not desire possession. Is the owner in this case entitled to legal interest on the award? (A pending appeal may provide an answer, as to present law.) If the owner is entitled to interest, should a condemnor be permitted to deposit the amount of the judgment in court, to stop the running of interest? If so,

should the owner be given the right to withdraw the deposit and under what limitations?

E. Miscellaneous Elements of Compensation.

1. Introduction

Any study of the elements of compensation should give consideration to certain items of damage which arise primarily in freeway and modern highway acquisitions. Because of the relatively recent development of freeways and expressways, there are few guide posts in the law to assist in determining the compensability of certain items, among which are the following:

(a) Noise, etc. Should damage caused by noise, smoke, dust, fumes and increased traffic on a freeway or heavily traveled highway in the vicinity be compensable?

(b) Loss of Access. Is the taking of a right of access to be valued as property taken under CCP 1248(1) or as damage to the remaining property under CCP 1248(2) and hence subject to being reduced by the amount of any special benefit (CCP 1248(3))?

(c) Circuity of Travel. Should the case law relating to the additional distance necessarily traveled to and from the property by virtue of the construction of the public improvement be formalized into a statute? Should the case law be modified? In this connection should an owner be entitled to damages for the construction of a dividing strip in the highway upon which his property abuts since this may require the owner and his customers to travel additional distances?

III. TAKING OF POSSESSION AND PASSAGE OF TITLE

A. Present California Procedure.

The California Constitution authorizes the taking of possession by specified public bodies prior to the time of trial in cases involving the acquisition of rights of way and reservoir sites. Procedurally, the condemning body can, upon the filing of the complaint or subsequently, file an affidavit of security and deposit in court an amount which the court determines, ex parte, to be sufficient to indemnify the owner for immediate payment of just compensation for the property taken and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for the taking. There is no provision for withdrawal of the deposit by the owner, and the condemnor remains liable to the owner for the reasonable value of the use and occupancy of the property (sometimes measured by legal interest) while it is in possession thereof prior to payment of compensation. Thus, while funds have been taken out of the control of the condemnor, present procedure neither serves to stop the running of interest which the condemnor must pay nor gives the owner use of the funds in lieu of the possession of his property.

B. Problems Attendant Upon Taking of Possession and Passage of Title Under Present California Procedure.

A review of present California procedure should give consideration to the following factors, among others:

1. Immediate Possession by All Condemnors and for All Purposes.

Present California procedure permits only specified public bodies to take immediate possession in certain limited cases -- (those involving the acquisition of rights of way and of property needed for reservoir purposes). Should the law be modified to permit certain additional classes of condemnors, or all condemnors, to have the right of immediate possession? Should such right be enlarged to cover additional public uses or all public uses?

2. Ex Parte Order.

Under present procedure the order of immediate possession may be made ex parte. Should the law be modified to require a hearing upon notice? If so, what notice should be required -- posting, publication, personal service?

3. Physical Possession.

The order of possession may be issued and served on the same day the complaint is filed, and, theoretically, possession may be taken by the condemnor immediately. Should the law be modified to allow the owner a reasonable period in which to vacate? If not, should there be provision in the law for compensatory damages in the event the owner is required to remove from the property without reasonable notice?

4. Change After Filing of Complaint.

(a) Effect of Loss. Following the filing of a complaint, either before or after possession is taken, a property

suffer damage from vandalism, fire or other causes. Should such loss fall upon the owner or the condemnor? What should be the treatment of insurance proceeds?

(b) Improvements Added. Present law provides that improvements added to a property following the service of summons upon the owner will not be compensated for (CCP 1249). This may be interpreted so as to preclude an owner from making normal maintenance repairs and replacements following such service and before he is deprived of possession. Is clarification required in this respect? If an owner's property is destroyed or damaged by fire after service and the insurance company rebuilds, are the improvements so added non-compensable?

5. Passage of Title.

By statute title vests in the plaintiff upon the recordation of the Final Order of Condemnation. Certain cases have indicated that the time of passage of title may be made to relate back to an earlier date where substantial change has been made in the property taken under an order of possession. Should the time of passage of title be changed by statute to another date, such as time of filing the complaint, the date possession is taken, etc.? (A redefinition of the time title passes might be used also to clarify problems of risk of loss and liability for taxes -- matters now affected with considerable uncertainty. As to taxes, see the discussion in Section VI F following.)

6. Compensation for Loss of Possession.

(a) Present Law. Under present law an owner is entitled

to receive the value of the use and occupancy of his property from the time possession is taken from him to the time of payment of the condemnation award. In many cases this value is measured by applying the legal rate of interest to the award. (This approach in effect treats the owner's damages as arising from a delay in the receipt of money.)

(b) Interest or Value of Use. Is interest fair compensation in all cases or should the value of use test be continued? Should both standards be set up, allowing the option either to the condemnor or to the condemnee?

(c) Partial Taking Cases. In a partial acquisition, should the condemnee, in the proper situation, be entitled to the reasonable value of the loss of use and occupancy on only the part taken or on all the property? If interest is the standard, should the condemnee be entitled to interest on only the award for the part taken or also interest on the award for severance damages?

(d) From When Payable. Should an owner be compensated for loss of possession from the date the complaint is filed, the date when the order of possession is issued, the date when physical possession is taken from him or some other date?

(e) Rate of Interest. If interest is adopted as the fair measure of compensation, what rate should be used -- the legal rate or a rate fixed by some other standard?

(f) Deposit in Court and Withdrawal. Under the present procedure where immediate possession is taken by a condemnor, the owner cannot withdraw the security deposited. Should the law be

modified to allow an owner to withdraw all or part of such deposit? Should such modification also provide that a deposit by the condemnor under such circumstances tolls the running of interest (or accrual of compensation for loss of use and occupancy)?

7. Damages Upon Relinquishment of Possession.

Under present law, if possession of the property is relinquished by the condemnor by abandonment or following a finding that there is no necessity for the taking, the owner is entitled to damages. Should the law be defined to specify to what damages he is entitled, i.e., damages to the realty only, damages for loss of business, consequential damages? In lieu of damages should the condemning body be estopped to abandon, in any case where physical possession of the property has been taken? What is the effect of an abandonment upon an owner's withdrawal of a deposit, if such be permitted? Does the condemnee have the duty to repay and if so, to what extent?

8. Advance Judicial Determination as to What Constitutes Personality and Realty.

Under certain circumstances there may be a question as to whether certain items of property are affixed to the realty or are personality. In such cases the taking of immediate possession by the condemnor requires the owner to elect, upon the unsettled law of fixtures, what items, if any, he shall remove. The condemnor, upon entering the property, must also elect as to what items are personality (which it must store) and what are realty. Should the law be revised to permit a judicial determination of the character of the property

prior to the time possession is taken?

C. Federal Declaration of Taking Procedure.

While it is not the purpose in this outline to set forth possible alternatives to present statutes and procedures, it is felt that a brief mention of the Federal Declaration of Taking procedure is warranted. Whereas the California procedure keeps title in the owner until the final order of condemnation, Federal procedure provides for passage of legal title at an early state of the proceedings. Under the Federal procedure (40 U.S.C.A. 258a), the condemnor may file concurrently with the filing of a condemnation action or at any subsequent time, a declaration of taking. In this document the condemnor recites that the appropriate Federal authority has determined the necessity of the taking and sets forth its estimate of the just compensation payable for the property sought to be condemned. This sum is deposited in court concurrently with the filing of the declaration of taking.

The filing of the declaration of taking and deposit serves to pass legal title in the property described to the condemnor, which cannot usually thereafter abandon the taking either in whole or in part except upon stipulation of the parties.

The declaration of taking may be followed by an order of the court authorizing the plaintiff to take possession of the property to which it has previously acquired legal title.

The owner of the property thus taken has the right to apply to the court for payment of the funds so deposited. The court is empowered to make a distribution of the funds which will protect the

interests of all claimants, and in practice it often withholds a portion of the funds to cover unpaid taxes and the value of subsidiary interests.

The owner retains the right to a judicial determination of the value of the interest being taken from him. If upon trial he recovers a sum in excess of the amount deposited, the excess bears interest at 6% per annum from the date of the declaration of taking. No interest is paid upon the amount deposited by the condemnor in the court registry. If the owner gets an award of less than the amount withdrawn by him from court, a judgment will be rendered against him, in the condemnation action, ordering the repayment of the excess amount.

It is apparent that this procedure permits a condemnor to stop the running of interest upon the amount deposited and also permits the owner to have the use of funds so deposited for the acquisition of other property and payment of expenses of moving.

In the event a similar procedure is considered for adoption in California, two serious problems are raised:

First, it may well be that a constitutional amendment would be necessary to place such procedures into effect. This matter, and the matter of possible alternatives, if any, for avoiding a constitutional amendment, would require thorough study.

Second, the effect of a declaration of taking procedure upon the condemnor's right of abandonment should be carefully considered. At present, any condemnor unsatisfied with an award may abandon the proceedings upon payment of certain costs and fees

to the owner (CCP 1255a). Under the declaration of taking procedure, actual legal title is passed on the filing of the declaration. The condemnor usually may not revest all or any portion of the property in the owner without the latter's consent. The effect of such limitation upon the condemnor's freedom of action should be carefully considered.

IV. EVIDENCE

A. Introduction.

California follows a minority rule which prohibits either party as a part of its direct examination from introducing testimony as to (1) the prices at which other comparable properties sold, (2) the income, actual or potential, received from the subject property and (3) the reproduction or replacement cost new less depreciation of improvements upon the property. Furthermore, even when such information is brought out upon cross-examination, it can be considered by the court or jury for the sole purpose of testing the credibility of the witness' opinion and not as direct evidence of value. There is even some doubt as to whether a prior purchase price for the identical property is admissible on direct examination, although certain cases have, by dictum, indicated a relaxation of the rule in this respect. This exclusionary rule has been criticized by the courts, and a concurring opinion in a recent District Court of Appeal decision (Petition for hearing granted) again urged a reconsideration of the advisability of bringing California in line with the majority.

Any consideration concerning the statutory revision of

this exclusionary rule and other evidentiary matters should include the following.

B. Sales of Comparable Property.

Should evidence of the price at which comparable properties sold be admissible on direct examination as affirmative evidence of value? As an alternative to this proposition, should such sales prices be admissible on direct examination to show the basis upon which the witness formed his opinion, although not affirmative evidence of value? Should the purchase price of the subject property be admissible on direct examination, either as direct evidence of value, or to show a basis of the witness' opinion?

If sale prices are admissible upon direct examination, what foundation, if any, should be required to establish their comparability before the price is admissible? If other sales are admissible as direct evidence of value, should they be limited to sales occurring prior to a date of value, or may sales after the date of value also be considered?

Are sales made to any body with a power of eminent domain admissible either as direct evidence of value or as showing the basis of the witness' opinion? If so, should a foundation be required for their admission to show that no element of compulsion affected the transaction?

C. Income.

Should evidence of income be made admissible on direct examination either as direct evidence of market value or in support of the appraiser's opinion?

If evidence of income is admissible upon direct examination should it be limited to the actual income which the property is producing, or should the evidence be based upon the witness' opinion as to the fair rental value of the property? If the property is not presently producing any income or the income produced does not reflect the highest and best use of the property, may the witness, in his opinion, project an income stream based upon the property's best use?

If income is admissible, should the witness be permitted to capitalize that income to arrive at his opinion as to the fair market value of the property? Should the capitalization method be admissible on direct examination as direct evidence of value or merely in support of the witness' opinion?

Should the evidence be limited strictly to "income" (defined by appraisal theory as earnings attributable to the use of real property, including improvements, only) or should evidence of "profits" (earnings resulting from the operation of a business on the property) also be admissible on the question of the value of the realty?

D. Reproduction Cost Less Depreciation.

Should replacement or reproduction cost less depreciation be admissible on direct examination either as direct evidence of market value, or in support of the witness' opinion? If admissible, should such evidence be admitted in all cases or only in special cases where there are no comparable sales for the appraiser to use in fixing his opinion?

E. Rebuttal as to Specific Facts Testified To by an Appraiser.

Under the present law the scope of rebuttal is uncertain. For example, if it is brought out upon cross-examination of one appraiser that the selling price of a particular property is X dollars, there is a question as to whether the other side may rebut such testimony to show a different selling price (on the theory that under present law the appraiser's opinion is the direct evidence of value and selling prices of other properties are collateral matters, not rebuttable). Should there be some provision in the law to permit the rebuttal of such specific facts? Also, should rebuttal be permitted as to matters of opinion, as well as to matters of fact?

V. RECOVERABLE COSTS.

A. Costs Upon Abandonment.

1. Time Limitations.

The present code section (CCP 1255a) provides that costs and disbursements shall not include expenses incurred in preparing for trial where the action is dismissed 40 days prior to the time set for the trial of the action. In view of the present pre-trial procedure and the fact that appraisal and other costs are often necessarily incurred well in advance of trial, especially where possession is taken, the question arises as to whether this time limit should be extended, or abolished entirely.

2. Definition of Costs of Preparing for Trial.

Should CCP 1255a be amended specifically to provide that the costs of preparation of trial include appraisal fees, costs of maps, photographs, title reports, surveys, etc.?

3. Contingent Fees.

Although Section 1255a provides for payment of a reasonable attorney fee to the owner upon abandonment, present California decisions hold that an attorney's fee is not recoverable upon abandonment if the fee is of a contingent nature. Should the statute be modified to provide for recovery of a reasonable attorney's fee even though the contract with the attorney is contingent upon the result?

4. Other Damages Upon Abandonment.

Section 1255a is presently limited to expenses incurred in the preparation for trial and attorney's fees. Should the property owner be entitled to additional damages suffered by virtue of an abandonment, such as damages for the frustration of the development of his property, for the loss of a profitable sale, or for those arising in other situations where it would be inequitable to allow an abandonment without payment of compensation?

B. Recoverable Costs in All Cases.

Under present California law the property owner's costs in eminent domain proceedings, other than under an abandonment, are limited to those recoverable in other civil actions. The owner is usually an involuntary party to condemnation litigation. Does the definition of "just compensation" require that the definition of costs be extended to include attorneys' fees, appraisers' fees, necessary expenses such as maps, photographs, surveys, etc.?

If the foregoing costs are allowable, should they be limited to a percentage of the total compensation paid, should they be fixed

by the court, or by some other standard? Should they be allowable in all cases, or, for example, only when the award exceeds the offer?

VI. ALLOCATION OF AWARD

A. Present Procedure.

Under CCP 1246.1 the condemnor is entitled to have the property therein first valued as a whole against all defendants claiming an interest. At a subsequent stage of the proceeding the award is apportioned among the various claimants -- the owners, tenants, lienholders, etc. However, the condemnor may (it appears) elect to have the value of each interest separately determined.

B. Option v. Absolute Rule.

Should the law be revised to require the condemnor in all cases to value the property as a whole, or in all cases to proceed against the owners of the various interests individually? If not, and the present option is retained, should the condemnor be required to make its election in its complaint?

C. Landlord -- Tenant Situation.

Many of the problems in connection with the allocation of awards arise between landlords and tenants. Illustrative of the problems are the following:

1. Valuation of Tenant's Interest.

Simply stated, the value of the tenant's interest has been said to be the bonus value of his leasehold estate -- that is, the difference between what he could sell the leasehold for on the open market and the rent reserved to the owner under the lease. The California Supreme Court recently established a different definition

in a tax case. Should a statutory definition be adopted for condemnation cases? (Bills have already been introduced for this purpose.)

Another problem arises where the tenant has placed improvements upon the property. These may add to the value of the leasehold interest, but may or may not add to the value of the property for its highest and best use. If they do not add value for the highest and best use, although of value to the leasehold estate, presumably such value would not be included in the award paid by the condemnor. Thus a tenant may claim from an owner compensation for the value of improvements which is not reflected in the compensation received from the condemnor. In other words, the sum of the parts may be greater than the value of the whole. Is legislation required either to assess the total value of the parts against the condemnor by separate valuation of the separate estates in the property, or to limit the tenant's recovery as against the owner?

Also, a recent case has indicated that the evidentiary standards for the apportionment of an award may not be the same as those for the fixing of value in the main case. (A tenant was permitted to show on direct examination his business income, an element usually excluded in the main case -- People v. Frahm, 114 CA2 61.) Should legislation be adopted applying the same standards of evidence both to the main case and to the apportionment?

2. Partial Taking or Entire Taking.

The case of City of Pasadena v. Porter, 201 Cal. 381, lays down the rule that where a portion only of leased property is

taken, the tenant is under a duty to continue payment of the full rent reserved. In order to compensate the tenant for the rent he must pay on the part taken, he is awarded, in addition to other compensable loss, a sum equivalent to the present value of the reserved rent applicable to the part taken. This procedure leaves the owner without security for the payment of his full rent although the tenant may have received a substantial sum for that purpose. Is legislation desirable to provide for a pro-rata reduction in rent in case of a partial taking, rather than payment of a lump sum to a tenant?

A further question arises where the purpose of a lease may be frustrated by the partial taking. If the tenant is unable to carry on the purpose for which the premises were leased, should the lease be terminated by the condemnation proceeding and, if so, under what circumstances?

3. Time of Interference with Lease.

Whenever leased property is condemned the problem arises, both with respect to apportionment of the award and in other respects, as to when the landlord and tenant relationship is so interfered with so that the rights and duties thereunder cease. In a situation where immediate possession is sought by the condemnor, is the landlord-tenant relationship terminated at the filing of the complaint, at the time of the issuance of an order for immediate possession, at the time of the service of the order, at the time actual physical possession is taken, at the date of trial, at the date of entry of interlocutory judgment, or at the time of final order

of condemnation, or some other time? Where immediate possession is not taken what date applies?

4. Effect of Temporary Taking.

Does a temporary taking relieve the lessor and lessee of their leasehold obligations, either temporarily or permanently, and to what extent? What items should be included in the award to the tenant for a temporary taking — moving costs, loss of business, loss of good will, etc.?

D. Lienor--Lienholder Situation.

1. Allocation in Entire Taking.

When an award is allocated between a lienor and lienholder in the case of an entire taking, generally the lienholder is entitled to a complete discharge of his obligation. Where the trust deed or other lien instrument calls for a fee to be paid upon prepayment, should such fee be payable in the event of condemnation?

Should the lienholder be entitled to attorneys' fees for appearing in the condemnation litigation? Should he in cases where there is no contest as to the amount of his claim?

To what date is the lienholder entitled to interest — to date of immediate possession, to date of judgment, to date of payment of the award into court, to date of receipt by the lienholder of payment, or to some other date?

2. Allocation in Partial Taking.

Frequently a trust deed will provide or a beneficiary will demand that the entire award in a partial taking case be applied against the debt. Should such a beneficiary be entitled to apply the

entire award against the unpaid balance or to receive only an amount which will compensate him for depreciation in the value of his security? If the latter, by what standards is such depreciation measured?

E. Vendor-Purchaser Situation.

1. Option to Purchase.

There is some indication in case law to the effect that an option to purchase real property is not such an interest in land as to require payment of compensation. Yet the condemnation of a parcel of land or a part thereof subject to an option as a practical matter may result in a substantial loss to the optionee. Should a definition be made of the rights and liabilities of the parties to an option when the optioned land is condemned?

F. Taxes.

1. Liability for Payment.

There does not seem to be any uniform practice at present concerning an owner's liability for taxes assessed during a condemnation proceeding. When should an owner cease to be liable for the taxes on his property? Should he be held liable for the entire fiscal year's taxes which have become a lien on the first Monday in March preceding the taking, or is an apportionment proper? To what date shall the apportionment be made -- the date of filing the complaint, the date of issuance or service of order of possession, the date actual possession is relinquished, the date of trial, judgment or final order, or some other date?

2. Partial Taking Situation.

Where only a portion of the owner's property is taken

two alternatives with respect to taxes falling due are presented, neither of them entirely satisfactory. An owner may either pay the taxes on the entire parcel, or withhold payment. He cannot pay the taxes on only that portion which will remain in his ownership, since assessors generally do not make a segregation of the taxes until the final order of condemnation has been recorded. If the owner pays the entire tax bill, he escapes tax penalties but is often paying taxes, for which no refund provision is provided, on property which shortly thereafter will be acquired by a condemning body. On the other hand, if an owner defaults on his taxes, he then suffers an imposition of the usual tax penalties. Should the owner be protected against such penalties until such time as the assessor has made an appropriate segregation?

3. Mechanics for Collection.

CCP 1252.1 formerly provided a statutory procedure for the determination of amounts due taxing authorities and for insuring payment of such amounts from the condemnation award. This section was repealed. Should a new statutory procedure be adopted?

VII. RIGHT TO CONDEMN

A. Condemnation Resolution Conclusive.

Under certain circumstances the resolution of condemnation adopted by certain condemning bodies is conclusive evidence that the taking is necessary, that the improvement is located in a manner most compatible with the greatest public good and least private injury and of the public necessity of the proposed public improvement. This presumption is rebuttable only upon a showing of fraud, bad

faith or abuse of discretion. Should the presumption be made conclusive as to additional public bodies, including quasi-public corporations? Should it be made rebuttable where one public body is acquiring property already devoted to a public use?

Should the presumption be rebuttable under circumstances other than fraud, bad faith or abuse of discretion?

B. Public Use.

Various statutes at present outline the public uses for which property may be condemned. Should a condemnor be permitted to condemn for public use solely upon an allegation that the property is needed for public use without specifying such use?

C. Public Hearing.

Should a condemning body be required to give notice and hold a hearing as to the location of a public improvement before the determination of such location? What is the extent of the application of Government Code Section 65551 (this section indicates that Planning Commission approval must be first sought before the acquisition of land or construction of a public improvement)?

D. Excess Property.

Should the right of public bodies to acquire property in excess of their needs, for the purpose of avoiding severance damage, be limited or extended? Should the owner be given an option to retain property sought as excess, upon a partial or complete waiver of severance damage?

VIII. PROCEDURE

A. Owner's Answer.

In addition to the usual answer, Federal procedure provides

for the filing of a much simplified notice of appearance. In it an owner need set forth only that he claims an interest in the property sought to be condemned. The notice of appearance may be filed by an owner in any case where he does not contest the necessity for the taking, and it entitles him to notice of further proceedings in the action. Should simplified pleading procedure for California condemnation matters be considered?

B. Pretrial Procedures.

In many cases the preparation of a condemnation case and the making of appraisals would be facilitated if disputed factual and legal matters could be decided prior to the time of trial. Such matters might relate, for example, to the character of property as personalty or fixtures, the reasonable probability of joinder of two separate parcels for a single use, the determination of the legal right to and extent of questioned access, the extent of the larger parcel in partial taking cases, etc. Present pre-trial rules leave some question as to whether such matters may be determined at pre-trial without the stipulation of counsel. Should special pre-trial rules be made applicable to condemnation proceedings to permit evidence to be taken and a determination of certain matters made in advance of trial?

A related matter concerns the disclosure of the details of the condemnor's construction plan, in those cases where there is partial taking and a possibility of severance damage to the remainder based upon such construction. Should the condemnor be required to disclose,

or furnish, a set of construction plans, profiles, specifications, etc. sufficiently far in advance to allow preparation for pre-trial and trial?

C. Burden of Proof.

Under present law the property owner must allege and carry the burden of proving the value of the property taken and the damages to the remainder.

Should consideration be given to placing the burden of proof on the condemnor?

Regardless of whether the burden of proof is changed, should the order of proof be changed. Present procedure requires the defendant to put on his case first. Should the condemnor be required to proceed first?

IX. SETTLEMENT NEGOTIATIONS

A. Disclosure of Appraisal.

As an aid to settlement, should appraisal figures be disclosed prior to the time of trial? If so, should they be disclosed at time of pre-trial or some other time? If at the pre-trial, should they be disclosed by each party to the other, or only to the judge in camera who would then undertake to promote settlement in cases where the appraisal differential was not great?

Apart from the question of disclosure of the amount of the appraisals, should the factual basis for appraisals be disclosed? Should each side be compelled to divulge the comparable sales upon which its appraisals are based, its opinion of highest and best use, its income studies, reproduction costs studies, basic legal assumptions,

and other matters?

B. Condemnor's Offer.

Should a condemnor be required to make a bona fide offer before filing suit? Should a condemnor be required to offer the highest of several appraisals? If the offer is not accepted by the owner, should the appraisals be reviewed by an independent appraisal board? What should be the composition of such board and what powers and authorities should it be given?

X. SPECIAL BENEFITS

A. Definition.

There are two types of benefits -- general and special; only the latter may be offset against severance damages under the law.

There is not any statutory definition of the distinction between special and general benefits. Should a statutory definition of special benefits be made?

B. Offsetting Benefits.

Under present law special benefits are offset against severance damage only, not against the award for the part taken. Under Federal procedures, benefits may be offset against the entire award. Should consideration be given to making special benefits the subject of offset against the entire award under California law?

C. Burden and Order of Proof.

There appears to be no California decisions placing the burden of proof as to special benefits. Should this burden be placed by statute upon the condemnor since such benefits amount to

an offset against damages? If so, should the owner be given an opportunity to put on his testimony as to special benefits following the condemnor's case, or should it be part of his main case at the initial stage of the trial?

XI. DATE OF VALUE

A. Delay in Trial.

The present statute provides that if trial shall not be had within one year from the filing of the complaint, through no fault of the defendant, the date fixed for valuing the property shall be deemed the date of trial. In a time of falling prices this rule may operate to the detriment of an owner without his fault. Should a different formula be adopted for fixing the date of value? Should it be the date of filing, the date possession is taken, the date of trial or some other date? Should there be an option and, if so, should it rest in the condemnor or condemnee?

XII. THE LARGER PARCEL

A. The Test for the Larger Parcel.

In a number of California cases a three part test has been applied to determine whether two areas of land in fact constitute a single parcel for the purpose of assessing severance damages. These cases hold that two areas are not a single parcel unless (1) they are physically contiguous, (2) there is a unity of title and (3) there is a unity of use. Dictum in several cases indicates a relaxation of the three part rule, to the extent that parcels physically separated might properly be deemed to be, under some circumstances, a single parcel by virtue of a unified use. Should

a statutory definition of a test for a single parcel be adopted?

Similarly, where several contiguous parcels in different ownership have been brought into a unified use by a single lessee, should the unity of title test be disregarded?

B. Parcel Crossed by Street.

Present cases seem to make a distinction between property crossed by a street where the underlying fee of the street is in the owner and where it is in a public body. In the first situation it has been held to be a single parcel, but in the latter there is some indication that the property would be separated into two parcels. Should the rule be made uniform to the effect that property crossed by a street is a single parcel, or two parcels, regardless of where the underlying fee rests?

XIII. PROBLEMS ARISING FROM SURVEY AND ROUTE DETERMINATION

A. Effect on Values.

In many cases, particularly in the case of freeway or highway acquisitions, the project may be planned and laid out several years in advance of the actual acquisition of the land. Rumors of the location of the improvement may have an unsettling effect on property values, working to the detriment of both property owners and condemnors, until the final location becomes definitely fixed. Can legislation be adopted which will serve to reduce the time lag between planning and final acquisition or otherwise aid in eliminating undesirable effects of a prospective condemnation?

XIV. INVERSE CONDEMNATION

An owner who finds his property taken or damaged for public

use without formal condemnation proceedings is subject to some hardship in recovering just compensation. He may be required to comply with technical claims statutes, to post bond and to assume liabilities for costs and possibly attorneys' fees in the event he does not prevail. A review of the law of inverse condemnation may be in order.

XV. UNOFFICIAL CONDEMNATION

Property may be taken from an owner under an asserted exercise of the police power, as for example where a planning commission requires the dedication of land for a highway, flood control channel, or other public improvement, as a condition of approval of the subdivision map. Similar dedications may be required as a condition of zone changes or variances. Are such requirements an exercise of the power of eminent domain, entitling the owner to compensation, or are they true exercises of the police power?

XVI. CONCLUSION

The problems outlined above are not all of equal seriousness. Some, in the opinion of the writer of this report, should be given immediate attention. Other problems arise less frequently and may not warrant study at this time.

In the opinion of the author of the outline, priority should be given by the Law Revision Commission to the study of the following problems:

A. Cost of Removal and Relocation (See discussion above, Paragraph II B, commencing on page 2).

B. Taking of Possession and Passage of Title (See discussion

above, Paragraph III, commencing on page 10).

C. Evidence -- the admissibility on direct examination of evidence as to the selling price of other comparable properties, the reproduction cost of the subject property, the income and profits on the subject property (See discussion above, Paragraph IV A, B, C and D, commencing on page 17).

Dated February 16, 1957.

/s/ Stanley S. Burrill

STANLEY S. BURRILL
OF
HILL, FARRER & BURRILL